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82-1308

No.

IN THE

Supreme Court of the United States

October Term, 1982

THE WILMINGTON MEDICAL CENTER, INC., and CRAWFORD H. GREENWALT, as Chairman of the Board of Trustees, and JOSEPH A. DALLAS, as Chairman of the Board of Directors,

Petitioners,

v.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PUERTO RICAN CIVIL RIGHTS LEAGUE, INC., OLDER AMERICANS COALITION, WILMINGTON UNITED NEIGHBORHOODS, BRANDYWINE TRINITY METHODIST CHURCH, on Behalf of Their Members and Others Similarly Situated, and RAYMOND W. BROWN, MARIA GALINDEZ, for Herself and as Parent and Guardian for Her Minor Children, Reynaldo Galindez and Pedro Galindez, MILAGRO QUINONES, DENISE SMOKES, on Behalf of Themselves and Others Similarly Situated; and CITY OF WILMINGTON, a Municipal Corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Is a plaintiff which has had final judgment entered against it on the merits of all claims raised a "prevailing party" to which a court may award attorney's fees under 42 U. S. C. § 1988 or 29 U. S. C. § 794a(b)?

2. May a party which has not succeeded on the merits of any claim attain "prevailing party" status by virtue of voluntary informal relief which it did not seek in its complaint or otherwise and which it unsuccessfully challenged as unlawful?

3. Did the Third Circuit apply the proper causation test in determining that an unsuccessful civil rights litigant has "prevailed" in the absence of any judicial relief?

4. May a plaintiff seeking an award of fees under 42 U. S. C. § 1988 and 29 U. S. C. § 794a(b) base its claim on a voluntary agreement to which it was not a party and which was not the product of an "action or proceeding"?

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OPINIONS BELOW

The opinion of the court of appeals which is the subject of this petition is reported at 689 F. 2d 1161 (3d Cir. 1982), and appears in the Appendix hereto. (App. A1-A30). An order amending that opinion was filed on September 20, 1982 and appears in the Appendix hereto. (App. A31-A32). The opinion of the court of appeals denying Wilmington Medical Center's petition for rehearing is reported at 693 F. 2d 22 (3d Cir. 1982), and appears in the Appendix hereto. (App. A79-A82). The opinion rendered by the United States District Court for the District of Delaware is reported at 530 F. Supp. 1018 (D. Del. 1981), and appears in the Appendix hereto. (App. A33-A74).

Opinions below on the merits of this litigation are reported at 426 F. Supp. 919 (D. Del. 1977); 436 F. Supp. 1194 (D. Del. 1977), *aff'd*, 584 F. 2d 619 (3d Cir. 1978); 453 F. Supp. 280 (D. Del. 1978), *rev'd. in part*, 599 F. 2d 1247 (3d Cir. 1979); 453 F. Supp. 330 (D. Del. 1978); 491 F. Supp. 290 (D. Del. 1980), *aff'd en banc*, 657 F. 2d 1322 (3d Cir. 1981).

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on September 20, 1982. (App. A77-A78). A timely petition for rehearing *en banc* was denied on November 8, 1982. (App. A79-A82). This petition for certiorari was filed within ninety days of the date on which the court of appeals denied WMC's petition for rehearing *en banc*. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Civil Rights Attorney's Fee Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (1976), amended 42 U. S. C. § 1988 by adding a provision for the award of attorney's fees. 42 U. S. C. § 1988 now reads, in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

The attorneys' fee provision of the Rehabilitation Act of 1973, 29 U. S. C. § 794a(b) (Supp. II 1978) provides:

> In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

This litigation was commenced on September 10, 1976, with the filing of a complaint alleging that The Wilmington Medical Center, Incorporated ("WMC")[1] violated Title VI of the Civil Rights Act of 1964, 42 U. S. C. 2000d ("Title VI"), and Section 504 of the Rehabilitation Act of 1973, 29 U. S. C. 794 ("Section 504"), by "selecting a site for the relocation and removal of certain inpatient and outpatient services which has the effect of excluding persons from participation in, denying them benefits of, and subjecting them to discrimination and segregation on the basis of race, national origin, or physical handicap." (App. A3). The complaint also named as defendants the Secretary of the Department of Health, Education and Welfare ("HEW"), the Director of the Bureau of Comprehensive Health Planning ("BCHP"), and the Chairman of the Health Planning Council, Inc. ("HPC") alleging that such defendants had violated their duty to enforce Title VI and Section 504 by approving WMC's relocation plan under Section 1122 of the Social Security Act, 42 U. S. C. § 1320a-1.

Late in 1976 cross-motions for summary judgment were filed in the district court by plaintiffs, HEW and the state planning agencies. Over plaintiffs' strenuous objections, the district court, *sua sponte*, stayed the action and ordered HEW to conduct a civil rights investigation. *NAACP v. Wilmington Medical Center, Inc.*, 426 F. Supp. 919 (D. Del. 1977). The HEW investigation led to a finding in July, 1977 that the implementation of WMC's relocation plan would constitute a *prima facie* violation of

1. The Wilmington Medical Center, Incorporated, filing this Petition for Certiorari as Petitioner in this proceeding, states that this is its original Designation of Corporate Relationships and that it is not owned by any parent corporation nor does it have any subsidiaries or affiliates.

Title VI and Section 504. (App. A5, A41). After negotiations between HEW and WMC, WMC voluntarily entered into a Contract of Assurances (the "Supplemental Agreement") with HEW which modified in certain respects WMC's original plan.

Immediately after HEW and WMC entered into the Supplemental Agreement, plaintiffs amended their complaint to challenge that agreement. (App. A5, A27, A43). Plaintiffs' Second Amended Complaint added to the cause of action against WMC a claim that, by entering into the Supplemental Agreement, WMC had further violated Title VI and Section 504. In all other respects, the claims against and the relief sought from WMC remained unchanged from that sought in the original complaint. Specifically, no claim was mooted by the Supplemental Agreement.

Ruling on plaintiffs' plenary attack on the Supplemental Agreement, the district court held that HEW did not act arbitrarily or capriciously in concluding that WMC's original plan, as amended by the Supplemental Agreement, would not violate Title VI or Section 504, that plaintiffs had no right to bring a private action under those statutes and that HEW and WMC were entitled to summary judgment. *NAACP v. Wilmington Medical Center*, 453 F. Supp. 280 (D. Del. 1978). On appeal, the Third Circuit reversed the district court on the private right of action issue and remanded the case for trial on the merits of the discrimination claims against WMC. *NAACP v. Wilmington Medical Center*, 599 F. 2d 1247 (3d Cir. 1979).

Following the remand of this action, HEW, BCHP and HPC were dismissed as defendants and plaintiffs filed yet another amended complaint. This Third Amended Complaint retained each of the claims and prayers for relief against WMC contained in the prior complaints, in-

cluding the claim that the relocation "as described in Plan Omega" violated Title VI and Section 504. Added were claims that WMC was intentionally discriminating and that WMC was violating the Age Discrimination Act (42 U. S. C. § 6106). Thereafter, trial was had on the merits of the claims against WMC. In a comprehensive opinion, following more than a month of trial, the district court concluded that plaintiffs had failed to prove discrimination on any of the claims asserted against WMC. *NAACP v. Wilmington Medical Center,* 491 F. Supp. 290 (D. Del. 1980). Final judgment in favor of WMC and against plaintiffs was granted as to all claims and WMC was awarded costs. The Third Circuit, sitting *en banc,* affirmed the decision of the district court. *NAACP v. Wilmington Medical Center,* 657 F. 2d 1322 (3d Cir. 1981).

Notwithstanding the fact that they had failed to prevail on the merits of any of their claims against WMC and that they had failed to obtain the primary relief which they sought, i.e., an injunction prohibiting the planned relocation of certain of WMC's services from the City of Wilmington, plaintiffs moved for attorneys' fees in the district court under Section 1988 and Section 794(b) as prevailing parties.

The district court rejected plaintiffs' contention that they were entitled to attorneys' fees for their success in asserting a private right of action, holding that plaintiffs' victory was procedural. *NAACP v. Wilmington Medical Center, Inc.,* 530 F. Supp. 1018 (D. Del. 1981). (App. A53). The district court also rejected plaintiffs' claim that they were the "catalyst" which persuaded the court to order the HEW investigation and that they were catalysts for the Supplemental Agreement. The court concluded that plaintiffs could in no way be considered to have succeeded in obtaining the declaratory and injunctive relief

they sought in regard to Plan Omega as modified. *Id.* (App. A56-A66).

On appeal, a divided panel of the Third Circuit, per Judge Gibbons, reversed and remanded the case on the ground that plaintiffs were prevailing parties with respect to the Supplemental Agreement. An order amending Judge Gibbons' opinion was filed on September 20, 1982. (App. A31-A32).

WMC timely filed a petition for rehearing *en banc* on October 4, 1982. This petition for rehearing *en banc* was denied over three dissents on November 8, 1982. *NAACP v. Wilmington Medical Center, Inc.*, 693 F. 2d 22 (3d Cir. 1982). (App. A79-A82).

The District Court for the District of Delaware had jurisdiction over these matters under 28 U. S. C. A. § 1331 (West Supp. 1982).

REASONS FOR GRANTING THE WRIT

I. The Decision Below Raises Significant and Recurring Problems by Expanding the Definition of a "Prevailing Party" Under 42 U. S. C. § 1988 Beyond That Intended by Congress.[2]

In *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U. S. 240 (1975), this Court held that a federal court cannot award attorneys' fees absent specific statutory authorization. The Court noted that Congress has carved out specific exceptions to the general "American Rule" that the prevailing party is not awarded attorneys' fees and that courts are not free to fashion new rules which expand these specific exceptions.

Congress enacted the Civil Rights Attorney's Fee Award Act, 42 U. S. C. § 1988, in response to *Alyeska*. The congressional purpose in authorizing awards of attorneys' fees to plaintiffs as prevailing parties was to assist private attorneys general in vindicating civil rights. As the legislative history of Section 1988 states:

> If private citizens are to be able to assert their civil rights, and if those who *violate* the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to *vindicate* these rights in court.

S. Rep. No. 94-1011, 94th Cong., 2d Sess., 2, *reprinted in* [1976] U. S. Code Cong. & Adm. News 5910 (emphasis added).

To be consistent with the policy underlying Section 1988, "the plaintiff must in some way vindicate a civil

2. Petitioner couches its arguments in terms of 42 U. S. C. § 1988. However, petitioner's arguments apply with equal force to the concept of a prevailing party in 29 U. S. C. § 794a(b) and similar federal statutes.

right at issue in the litigation against the violator of that civil right in order to be considered a 'prevailing party.'" *Doe v. Busbee*, 684 F. 2d 1375, 1381 (11th Cir. 1982). The Third Circuit in this case expands the concept of a "prevailing party" beyond that envisioned by Congress and in contravention of this Court's holding in *Alyeska*. As Judge Adams stated in dissenting from the denial of the petition for rehearing below:

> Because the result reached by the majority appears to go considerably beyond the concept of "prevailing party" set forth by Congress in the legislation and because it appears to far exceed the legislative intent which underlies the Fee Award Act, I believe it would be salutory for the court in banc to reexamine in the context of this case the reach of the "prevailing party" element set forth in the statute.

NAACP v. Wilmington Medical Center, Inc., 693 F. 2d at 24 (3d Cir. 1982). (App. A82).

The plaintiffs in this action did not succeed on the merits of any of their discrimination claims against WMC. Thus, the only possible basis for a claim that they have "vindicated" rights is with respect to the negotiations between WMC and HEW over the Supplemental Agreement. However, the HEW's investigation of Plan Omega had resulted in only a *prima facie* finding of discrimination. It has never been determined by anyone that Plan Omega, either as originally proposed or as amended by the Supplemental Agreement, violated anyone's civil rights. Plaintiffs, therefore, cannot be said to have vindicated any civil rights or "prevailed," especially in light of the district court's finding that "plaintiffs did not succeed on the merits of any of the discrimination claims asserted against WMC nor did they obtain any of the relief sought against WMC." (App. A52.)

Prior to this decision the courts of appeals had allowed an award of attorneys' fees pursuant to Section 1988 only in the following circumstances. First, fees have been awarded where a plaintiff secured formal judicial relief either by winning at least one issue on the merits, *e.g., Dawson v. Pastrick*, 600 F. 2d 70 (7th Cir. 1979), or by securing a consent judgment, *e.g., Gagne v. Maher*, 594 F. 2d 336 (2d Cir. 1979), *aff'd*, 448 U. S. 122 (1980). Second, in absence of any formal relief, plaintiffs have been awarded fees where the relief accorded was substantially all of the relief which plaintiff requested, or where the remedial action had the effect of mooting the plaintiff's case, *e.g., Doe v. Marshall*, 622 F. 2d 118 (5th Cir. 1980), *cert. denied*, 451 U. S. 993 (1981).

Notwithstanding this precedent, the Third Circuit has expanded the definition of "prevailing party" to include the plaintiffs in this case despite the fact that they suffered a complete loss on the merits, despite the fact they obtained none of the relief which they sought, despite the fact that they attacked the Supplemental Agreement as a separate violation of Title VI and Section 504, and despite the district court's finding that any benefits that were conferred were not causally related to the efforts of the plaintiffs. The Third Circuit's holding opens the door to recovery by plaintiffs who have not vindicated any right, against parties who have not violated any rights. As such it contravenes the Congressional intent behind Section 1988 and this Court's holding in *Alyeska*.[3]

3. Additionally, the decision of the Third Circuit would extend Section 1988 to allow an award of attorney's fees to plaintiffs notwithstanding the fact that they were not a "party" to the HEW investigation or negotiation of the Supplemental Agreement (45 CFR §§ 80.7, 80.9, 80.10 and 81.23) and that such investigation and negotiations were not "proceedings" under the Title VI administrative framework, which stresses informal means of resolution. 42 U. S. C. § 2000d-1; 45 CFR § 81.51.

Moreover, the holding herein is not limited to Section 1988, but would apply as well to the numerous other federal statutes which allow an award of fees only to a prevailing party. E.g., 42 U. S. C. § 2000e-5(k); 42 U. S. C. § 2000a-3(b); 42 U. S. C. § 1973l(e). Under the drastic new rule fashioned by the Third Circuit, the federal courts will undoubtedly be deluged with petitions for attorneys' fees by nonprevailing plaintiffs, who no longer need prevail on the merits of any claim or achieve any of the relief which they sought, and who in fact may have attacked as unlawful the very benefits upon which they claim to have prevailed. To paraphrase the dissent of Judge Adams to the denial of rehearing below, it would be salutory for this Court to reexamine in the context of this case the reach of the "prevailing party" element set forth in Section 1988 and similar federal statutes.

II. The Decision of the Third Circuit Conflicts in Principle With Decisions of This Court and Other Circuits by Allowing Attorney's Fees Despite an Adverse Determination on the Merits of All Claims.

Under Section 1988, only "the prevailing party" may be entitled to an award of attorney's fees. Where there has been a judgment on the merits of a claim, the determination of the prevailing party is self evident. In this case, however, the Third Circuit has held that plaintiffs are entitled to attorney's fees notwithstanding the fact that judgment was entered against plaintiffs on all claims raised and all of the relief which they sought has been denied.

The position of the Third Circuit that a complete loss on the merits does not preclude an award of attorneys' fees conflicts in principle with this Court's opinion in *Hanrahan v. Hampton*, 446 U. S. 754 (1980). In *Hanrahan v. Hampton*, the district court had directed a verdict

in favor of defendants on plaintiff's claims alleging violations of constitutional rights. On appeal, the court of appeals reversed and remanded the case for a new trial. The court of appeals also awarded attorneys' fees to plaintiffs under Section 1988 on the theory that they had prevailed on their appeal. This Court, however, found that the plaintiffs were not prevailing parties, holding:

> The respondents have of course not prevailed on the merits of any of their claims. The Court of Appeals held only that the respondents were entitled to a trial of their cause. As a practical matter they are in a position no different from that they would have occupied if they had simply defeated the defendants' motion for a directed verdict in the trial court. The jury may or may not decide some or all of the issues in favor of the respondents. *If the jury should not do so on remand in these cases, it could not seriously be contended that the respondents had prevailed.*

446 U. S. at 758-59 (emphasis added).

The holding of the Third Circuit conflicts with the italicized language since it permits a fee claimant to "prevail" within 42 U. S. C. § 1988 despite an adverse judgment on the merits of all claims raised. It further conflicts with this Court's finding that "Congress intended to permit the interim award of counsel fees only when a party has prevailed on the merits of at least some of his claims." 446 U. S. at 758.

The Third Circuit's holding also conflicts with the decisions of other circuits which properly deny prevailing party status to a fee claimant which has had judgment entered against it on the merits of its claims.[4]

4. The majority decision herein also conflicts with other panel decisions in the Third Circuit. *See Hughes v. Repko*, 578 F. 2d

In *Taylor v. Safeway Stores, Inc.*, 524 F. 2d 263 (10th Cir. 1975), plaintiff brought an individual and class action against his employer claiming discriminatory employment practices in violation of 42 U. S. C. § 2000e *et seq.* and 42 U. S. C. § 1981. After a trial on the merits, the court found for Taylor on his individual claim and awarded him back pay and attorneys' fees. Finding no merit in the class action the court refused to award attorneys' fees. Taylor appealed, claiming, *inter alia*, that he should be awarded attorneys' fees for the class action since it was the impetus for Safeway's alteration of its employment practices. The Tenth Circuit upheld the denial of fees stating:

> Even if Taylor could show that these changes were a direct result of his lawsuit, he still would not be entitled to attorney's fees for the class since he did not prevail on any of the class claims.

524 F. 2d at 273.

The principle of the *Taylor* holding was later recognized in *Chicano Police Officers' Association v. Stover*, 624 F. 2d 127 (10th Cir. 1980). In *Stover*, plaintiffs sought attorneys' fees under 42 U. S. C. § 2000e-5(k) and 42 U. S. C. § 1988 for securing a stipulated judgment. The Tenth Circuit reversed the trial judge's denial of fees and remanded the cause noting that "[a] court determination of the merits is not required for plaintiff to be found the prevailing party." 624 F. 2d at 131. However, the court noted:

> If there is a court determination on the merits against plaintiff, we have held this will prevent the award of attorneys' fees regardless of any positive effect the

4. (Cont'd.)

483, 487 (3d Cir. 1978); *Luria Brothers & Co., Inc. v. Allen*, 672 F. 2d 347, 358 (3d Cir. 1982).

lawsuit has. See *Taylor v. Safeway Stores, Inc.*, 524 F. 2d 263, 273 (10th Cir. 1975). See also *Pearson v. Western Elec. Co.*, 542 F. 2d 1150, 1153 (10th Cir. 1976) (even though plaintiff "won" on the merits in a separate arbitration proceeding, attorneys' fees not awarded because plaintiff did not prevail in the court action).

624 F. 2d at 131, n. 5. See also, *Operating Engineers Local Union No. 3 v. Bohn*, 541 F. Supp. 486 (D. Utah 1982) (quoting the above).

The Third Circuit's decision also conflicts with the rule in the Fourth, Sixth, Seventh and Eleventh Circuits, which requires that a party prevail on at least some of its claims on the merits to be a prevailing party under Section 1988. Thus, in *Smith v. University of North Carolina*, 632 F. 2d 316, 352 (4th Cir. 1980), it was held that "to receive attorney's fees allowed by statute to the prevailing party, a party must prevail on the merits of at least some of his claims." In *Reed v. Rhodes*, 691 F. 2d 266, 268 (6th Cir. 1982) (emphasis in original), the court stated: "42 U. S. C. § 1988 permits a district court to allow a reasonable attorney's fee to *the prevailing party* as costs in designated civil rights actions. If a civil rights case is lost by the plaintiff there can be no award of attorney's fees." In *Muscare v. Quinn*, 680 F. 2d 42, 44 (7th Cir. 1982) the court stated that "this circuit interprets 'the prevailing party' referred to in section 1988 as the party who prevails on the merits of the underlying litigation." And, in *Doe v. Busbee*, 684 F. 2d 1375, 1381 (11th Cir. 1982), an award of attorney's fees was reversed where "the plaintiffs ultimately did not prevail on a single legal issue in the case."

The decision of the Third Circuit herein, which allows attorney's fees under Section 1988 to a party which has not prevailed on the merits of a single issue in an action

which has gone to judgment, conflicts with the foregoing decisions and these conflicts justify the grant of certiorari to review the judgment below.

III. The Circuits Conflict on the Degree of Success Required in Determining Whether a Plaintiff Has "Prevailed" Under 42 U. S. C. § 1988.

As the legislative history to Section 1988 makes clear, in the absence of an adverse adjudication on the merits, it is possible for a party to prevail under the statute by vindicating civil rights "through a consent judgment or without formally obtaining relief." S. Rep. No. 94-1011, 94th Cong., 2d Sess. 5 1976, *reprinted in* [1976] U. S. Code Cong. & Ad. News 5908, 5912. There is no disagreement on this point. There is, however, a conflict among the circuits on the degree of relief a plaintiff must achieve to "prevail" in a case where there is no formal judicial relief.

In the case at bar, the Third Circuit found plaintiffs to be prevailing parties in that they had achieved "some of the benefits" they sought in initiating the lawsuit when the Supplemental Agreement was executed. It so held notwithstanding its findings that plaintiff "never obtained the injunction or declaratory judgment they sought against Plan Omega" (App. A12-A13) and that "the relief obtained by virtue of the Supplemental Agreement was, in the plaintiff's view, inadequate and subject to attack. (App. A15).

The "some of the benefit" standard relied upon by the Third Circuit conflicts with the standard in the Fifth and Ninth Circuits, which requires that fee claimants obtain the primary or central relief sought in the litigation. Thus, in *Besig v. Dolphin Boating and Swimming Club*, 683 F. 2d 1271 (9th Cir. 1982), the Ninth Circuit denied plaintiff's application for attorney's fees under Section 1988 on the ground that they had not succeeded on their central claim. The court stated:

> Although Rodman's complaint contained a reference to non-member access, the focus on eligibility for attorney's fees is whether plaintiffs prevail on the *central* issue of the litigation or acquire the primary relief they seek. *Iranian Students Association v. Edwards*, 604 F. 2d 352, 353 (5th Cir. 1979).

683 F. 2d at 1279 (emphasis in original).[5]

A line of Fifth Circuit cases holds that a plaintiff seeking attorneys' fees must be successful on the central issue, as exhibited by the fact that he has acquired the primary relief sought. *Taylor v. Sterrett*, 640 F. 2d 663 (5th Cir. 1981); *Ramos v. Koebig*, 638 F. 2d 838 (5th Cir. 1981); *Doe v. Marshall*, 622 F. 2d 118 (5th Cir. 1980); *Iranian Students Association v. Edwards*, 604 F. 2d 352 (5th Cir. 1979). These decisions squarely conflict with the Third Circuit's holding which allows a plaintiff to recover attorney's fees where he has achieved only "some of the benefits sought" by his litigation.

The Fourth, Seventh and Tenth Circuits appear to apply a standard similar to, although possibly less stringent than, the Fifth and Ninth Circuits. In these circuits the plaintiff must have received substantial benefits or have achieved or furthered in a significant way the basic objectives sought in bringing the lawsuit. *Bonnes v. Long*, 599 F. 2d 1316 (4th Cir. 1979); *Dawson v. Pastrick*, 600 F. 2d 70 (7th Cir. 1979); *Chicano Police Officers Ass'n. v. Stover*, 624 F. 2d 127 (10th Cir. 1980).

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5. In determining that plaintiff had secured some of the benefits they sought herein, the Third Circuit ignored the central issue and the primary relief sought and referenced instead certain allegations in plaintiff's complaint. (App. A13). However, there is no dispute that the injunctive and declaratory relief actually prayed for by the plaintiffs was entirely denied. The district court stated: "[I]t is clear that the plaintiff did not succeed on the merits of any of the discrimination claims asserted against WMC nor did they obtain any of the relief sought against WMC." (App. A52).

In the instant case plaintiffs sought but did not obtain injunctive and declaratory relief and they themselves attacked the benefits conferred by the Supplemental Agreement, asserting that the Supplemental Agreement itself constituted a further violation of Title VI and Section 504. The fact that the Third Circuit relied upon this "relief" in determining that plaintiffs were entitled to an award of fees underscores the conflict between the Third Circuit test and that prevailing in other circuits and evidences a need for guidance from this Court as to the degree of success necessary to be a prevailing party.

This Court has addressed the issue only once. In *Maher v. Gagne*, 448 U. S. 122 (1980), the Court, per Justice Stevens, rejected the petitioner's contention that the respondent had not obtained sufficient relief to be considered the prevailing party. In so doing, the Court relied on the district court's finding that plaintiff "had won 'substantially all of the relief originally sought in her complaint' in the consent decree." 448 U. S. at 127 (citation omitted).

The courts of appeals have found a similar degree of relief to be sufficient to accord prevailing party status to the plaintiff. *Ramos v. Koebig*, 638 F. 2d 838, 845 (5th Cir. 1981) ("... principal relief prayed for in plaintiff's complaint was for an injunction . . . precisely the relief ordered by the district court."); *Northcross v. Board of Education of Memphis City Schools*, 611 F. 2d 624, 636 (6th Cir. 1979), *cert. denied*, 447 U. S. 911 (1980) ("[i]n spite of the lack of a formal order, the plaintiffs still obtained the relief which they sought. . . ."); *Gagne v. Maher*, 594 F. 2d 336, 340 (2nd Cir. 1979), *aff'd*, 448 U. S. 122 (1980) (quoting the district court, "the consent decree gave the plaintiff . . . virtually all the relief sought in the complaint."); *Williams v. Alioto*, 625 F. 2d 845, 847 (9th Cir. 1980), *cert. denied*, 450 U. S. 1012

(1981) ("the preliminary injunction prevented appellants from continued enforcement of their original guidelines, which is precisely the relief appellees sought.").

By contrast, the Third Circuit awards prevailing party status to a party which received none of the relief which it sought in the complaint or otherwise on the basis of "benefits" which plaintiffs challenged as unlawful and against which they fought unsuccessfully over a number of years at great cost to themselves and all other area hospital care recipients.

This Court should grant certiorari to resolve the conflict among the circuits on this issue and establish a test for determining when plaintiffs, in absence of a positive merits adjudication, have received sufficient relief to be considered a prevailing party under 42 U. S. C. § 1988.

IV. The Circuits Are Divided on the Appropriate Causation Test to Be Applied in Determining a Prevailing Party Under 42 U. S. C. § 1988.

In determining whether a plaintiff has vindicated rights under Section 1988, the courts of appeals, in addition to requiring that claimants show that the relief they sought has been achieved, have required that claimants show that their action brought about these benefits. However, the circuits are divided over the proper test to apply in determining causation.

In the instant case the Third Circuit held that the test is whether plaintiffs' efforts were a "material factor" in bringing about the relief. (App. A16-A17). Applying this test, the court states:

> If, after filing of suit, WMC had voluntarily amended Plan Omega, there would be little doubt that plaintiffs could be entitled to fees. See, *e.g.*, *Parham v. Southwestern Bell Telephone Co.*, 433 F. 2d 421

(8th Cir. 1970), *cited with approval in* Senate Report at 5; House Report at 7. There is no sound reason for departure from this practice simply because the district court ordered the administrative investigation and the changes in Plan Omega were not voluntarily instituted.

689 F. 2d at 1169. (App. A17).[6]

The causation test set forth by the Third Circuit is devoid of any requirement that the benefit to the plaintiff have a basis in law. A similar test obtains in the Fourth Circuit. *Young v. Kenley*, 641 F. 2d 192 (4th Cir. 1981), *cert. denied*, 455 U. S. 961 (1982); *Bonnes v. Long*, 599 F. 2d 1316 (4th Cir. 1979), *later appeal*, 651 F. 2d 214 (4th Cir. 1981), *cert. denied*, 455 U. S. 961 (1982).

In both the instant case and *Young v. Kenley*, the mere fact that relief[7] became available after suit was instituted was sufficient to satisfy the court of appeals that plaintiffs had caused that relief. Neither circuit has any requirement that the benefit to plaintiff must have a basis in law. That is, there is no requirement that the settlement or other relief must be legally caused by the plaintiff's suit.

It appears that the Ninth Circuit simply requires that fee-claimants establish "some sort of clear, *causal relation-*

6. The trial court expressly found that WMC voluntarily entered into the Contract of Assurances with HEW. (App. A41-A42).

7. Notably, in *Young v. Kenley, supra*, the plaintiff obtained the relief which she sought, a promotion and partial back pay. In this case, however, the plaintiffs strenuously opposed the "relief" which they now claim entitles them to an award of attorneys' fees. In fact, plaintiffs second amended complaint charged that the Supplemental Agreement was illegal and that by entering into it WMC had further violated Title VI and Section 504. (App. A43). This claim, of course, was wholly unsuccessful.

ship between the litigation brought and the practical outcome realized." *Besig v. Dolphin Boating and Swimming Club*, 683 F. 2d 1271, 1278 (9th Cir. 1982) (*quoting American Constitutional Party v. Munro*, 650 F. 2d 184, 188 (9th Cir. 1981) (emphasis in original)).

In contrast, the First, Fifth, Seventh and Eighth Circuits employ a two-part causation test. This test was developed by the First Circuit in *Nadeau v. Helgemoe*, 581 F. 2d 275 (1st Cir. 1978). The *Nadeau* causation test first requires that plaintiffs suit be "a necessary and important factor in achieving the improvements. . . ." 581 F. 2d at 281. However, this does not end the inquiry.

> Even if plaintiffs can establish that their suit was causally related to the defendants' actions which improved their condition, this is only half of their battle. The test they must pass is legal as well as factual. If it has been judically determined that defendants' conduct, however beneficial it may be to plaintiffs' interests, is not required by law, then plaintiffs must be held to have acted gratuitously and plaintiffs have not prevailed in a legal sense.

581 F. 2d at 281. *Accord, Williams v. Leatherbury*, 672 F. 2d 549 (5th Cir. 1982); *Harrington v. DeVito*, 656 F. 2d 264 (7th Cir. 1981), *cert. denied*, 451 U. S. 993 (1981); *United Handicapped Federation v. Andre*, 622 F.2d 342 (8th Cir. 1980).

The *Nadeau* requirement that there must be a basis in law for the benefits received by the fee claimant is wholly absent from the test prevailing in the Third and Fourth Circuits. Petitioners submit that the *Nadeau* test is the proper test, since without a basis in law for the relief obtained plaintiffs cannot be said to have vindicated a civil right against a violator of that right, as contemplated by Congress in Section 1988.

This Court should grant certiorari to resolve the conflict between the circuits and to establish a causation standard under 42 U. S. C. § 1988 that is consistent with the purpose of that Act.

CONCLUSION

For the foregoing reasons, a Writ should issue to review the judgment and opinions of the Third Circuit.

Respectfully submitted,

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